IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 25, 2005

STATE OF TENNESSEE v. MELISSA POWELL

Direct Appeal from the Circuit Court for Lincoln County
No. S0500039 Robert Crigler, Judge

No. M2005-01216-CCA-R3-CD - Filed November 30, 2005

The defendant appeals the trial court's denial of alternative sentencing. Upon review, we conclude that the presumption of alternative sentencing is rebutted because measures less restrictive than confinement have recently been applied to the defendant unsuccessfully. Specifically, less than one year after being placed on probation for two counts of forgery, the defendant was convicted in the instant case of identity theft, theft under $500, and six counts of forgery. Therefore, we affirm the trial court's denial of alternative sentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Donna Leigh Hargrove, District Public Defender, and Andrew Jackson Dearing, III, Assistant Public Defender, for the appellant, Melissa Powell.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; William Michael McCown, District Attorney General; and Ann L. Filer and Melissa Thomas, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The defendant, Melissa Powell, entered open guilty pleas to one count of identity theft (a Class D felony), one count of theft of property greater that $500 (a Class E felony), and six counts of forgery (a Class E felony). The defendant was sentenced as a Range I, standard offender to concurrent sentences of three years for identity theft and to one and one-half years on each remaining count, for a total effective sentence of three years. The defendant's sole contention on appeal is that the trial court erred in denying alternative sentencing.

At the plea hearing, the State, with the defendant's stipulation, summarized the facts underlying the offenses as follows:

> . . . . [T]he State's proof would be that Ms. Patricia Stevenson, spelled with a V, was notified by her bank, which was Colonial Bank, she was advised on or about December 29, 2004, that her VISA debit card, which had been issued through that bank, there had been an unusual pattern of usage on it. A red flag went up. They notified her to make sure that she was the person in fact using the card.
>
> She was not the person who used the card. She had last used her card on December 28th, 2004, at 6:14 at Murphy USA located here in Fayetteville, Lincoln County.
>
> [The defendant] was employed there; was the clerk there, and Mrs. Stevenson was a customer. It is not known whether or not [the defendant] picked up the card dropped by Ms. Stevenson or if she just retained the card and didn't return it to Ms. Stevenson or how it was that it came into [the defendant's] possession.
>
> After Ms. Stevenson had left the store on December 28, [the defendant] utilized the card to make a series of purchases and transactions, none of which were authorized by Ms. Stevenson. The total of the transactions is $873.75.
>
> The card was used five times at Murphy Oil.
>
> One time at Texaco.
>
> One time at Dollar General.
>
> One time at Whispers.
>
> One time – twice at Wal-mart.
>
> And one time at the Shoe Show for a total of $873.75 electronic transfers on the card.
>
> The entity to which any restitution is owed, if we ever come to that point, is Colonial Bank.

At the sentencing hearing, the defendant testified that at the time of the offenses, her husband was in jail and she had been temporarily laid off from her job at Goodman. She acknowledged convictions of theft, worthless checks, disorderly conduct, and two counts of forgery, all in 2004, and further noted that all of her fines, fees, and restitution from those convictions had been paid. The defendant testified that she could get a job at the Country Club or at Goodman if she was not incarcerated. She further stated that she had never been in jail and that she felt "really bad" about

what she had done. Finally, she stated that she would be willing to pay any restitution owed to the victim in this case and participate in the community corrections program.

On cross-examination, the defendant stated that she bought a phone card and clothes with the victim's debit card, in hopes of selling the items to pay her electric bill and past due rent. She also acknowledged that her mother paid her fines, fees, and restitution in her previous cases. The defendant admitted that, at the time of the subject offenses, she was on circuit court probation from her July 2004 convictions.

After taking the matter under advisement, the trial court reconvened and rendered its findings on the record in open court. At that time, the trial court applied enhancement factors (9) and (14), giving both great weight, and applied mitigating factors (1), (7), and (13), giving the latter two slight weight. For the charge of identity theft, the trial court began with the presumptive sentence of two years, enhanced it to three and one-half years, and mitigated it to three years. For each remaining count (all Class E felonies), the trial court enhanced the presumptive one-year sentence to one year and nine months, and mitigated it to one year and six months. The sentences were ordered concurrent, and alternative sentencing was denied.

Analysis

This court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (2004). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is de novo. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40-35-210(b), to consider the following factors in sentencing:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration. An especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6) (2004).

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1); see also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and 114, as they are relevant to the section 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5) (2004); Boston, 938 S.W.2d at 438.

There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. Tenn. Code Ann. § 40-35-103(2) (2004); State v. Batey, 35 S.W.3d 585, 588-89 (Tenn. Crim. App. 2000). Indeed, individualized punishment is the essence of alternative sentencing. State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). In summary, sentencing must be determined on a case-by-case basis, tailoring each sentence to that particular defendant based upon the facts of that case and the circumstances of that defendant. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986).

In the present case, the trial court denied alternative sentencing because "it would depreciate the offense and probation completely to have somebody who has two prior felony convictions who has been convicted in sessions court within a year of that and of all of these crimes within a year." See Tenn. Code Ann. § 40-35-103(1)(B) (2004). However, our supreme court has held that in order for this subsection to apply, the circumstances of the subject offense must be "'especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree'" and "'must outweigh all factors favoring probation.'" State v. Fields, 40 S.W.3d 435, 441 (Tenn. 2001) (quoting State v. Cleavor, 691 S.W.2d 541, 543 (Tenn. 1985); State v. Hartley, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)).

Although identity theft and its related offenses are certainly on the rise and may result in serious and lasting consequences to victims, we cannot agree that the conviction offenses in this case meet the standard set out in Fields. However, we do conclude that alternative sentencing was properly denied based on Tennessee Code Annotated section 40-35-103(1)(C), which states that "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." In determining the length of the sentences, the trial court made the following finding:

> She is on – the [sic] took the two felony sentences in this court, I believe, in February of '04 and these offenses occurred in December of '04. So she had not even made it a year on circuit court probation before breaking the law.

She also had a bad check conviction in sessions court after that. So she had been convicted twice while on probation out of this court.

Given the defendant's recent history of similar offenses[1] and the failure of probation to effectively deter her from such conduct, it is our determination that alternative sentencing was properly denied.

Conclusion

Based upon the foregoing reasoning, we affirm the trial court's denial of alternative sentencing.

JOHN EVERETT WILLIAMS, JUDGE

[1] The presentence report reflects that the two felony convictions the trial court notes are for forgery up to $1,000.